NO 22861

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE FIGUEROA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

Appellant, JOE FIGUEROA (hereinafter referred to as "FIGUEROA"), and codefendants Antonio Rosario (hereinafter referred to as "Rosario"), and Carmello Ocasio (hereinafter referred to as "Ocasio"), were indicted by the Federal Grant Jury for the Central District of California, on April 26, 1967 (C. T. 2]. 1/ The indictment alleged that on March 29, 1967, Ocasio committed an armed robbery of a United States Post Office in violation of Title 18, United States Code, Section 2114 [C. T. 2].

1/ "C. T." refers to Clerk's Transcript.

FIGUEROA and Rosario were charged with aiding and abetting the robbery of this post office [C. T. 2].

On May 1, 1967, FIGUEROA was arraigned in the court of the Honorable E. Avery Crary, United States District Judge for the Central District of California. At this time FIGUEROA entered a plea of not guilty to the charges contained in the indictment [C. T. 11]. Judge Crary assigned the case to the Honorable Charles H. Carr, United States District Judge for all further proceedings [C. T. 11].

On June 13, 1967, Rosario withdrew his plea of not guilty and entered a plea of guilty to the lesser included offense of robbing a United States Post Office without the use of a dangerous weapon [C. T. 12]. On June 13, 1967, Ocasio also withdrew his plea of not guilty and entered a plea of guilty to the lesser included offense [C. T. 12]. The trial of defendant FIGUEROA commenced on June 13, 1967. On June 14, 1967, the jury returned a verdict finding FIGUEROA guilty of the lesser included offense, to wit, robbery of a United States Post Office without placing in jeopardy the life of any victim [C. T. 14-15].

On June 26, 1967, FIGUEROA was sentenced to the custody of the Attorney General for a period of ten years [C. T. 16]. On August 3, 1967, defendant FIGUEROA filed a notice of appeal [C. T. 19-22].

The jurisdiction of the District Court was based upon Section 2114 of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant

to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF FACTS

At the outset of the case, Judge Carr had a conference with counsel and obtained counsel's consent to discuss the sentencing provisions of Title 18, United States Code, Section 2114, concerning the 25-year sentence set forth in the statute and charged in the indictment [R. T. 22]. 2/ Judge Carr explained to the entire jury panel that FIGUEROA was on trial for a very serious offense, that if convicted on a charge of armed robbery of a post office he would be incarcerated for 25 years. Judge Carr further advised the jury that some of the evidence against FIGUEROA would be the testimony of Ocasio and Rosario who had entered pleas of guilty to a lesser included offense and that the maximum period of incarceration they faced was 10 years. Judge Carr clearly pointed out to the jury that a very weighty decision would be placed upon their shoulders and that if there existed any question of FIGUEROA's guilt in their minds they should acquit the defendant for the crimes of which he was charged [R. T. 23-24, 32-33].

At the trial, the evidence disclosed that on the morning of March 29, 1967, FIGUEROA met with Rosario in Wilmington, California [R. T. 84]. Shortly thereafter, FIGUEROA and Rosario

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2/ "R. T." refers to Reporter's Transcript.

picked up Ocasio and they all returned to Rosario's living quarters [R. T. 85-86]. While at Rosario's apartment, FIGUEROA told Rosario and Ocasio of the post office located on Carson Street in the Dominguez area which was operated by a single employee and which would be an easy place to rob [R. T. 86, 137]. After this brief discussion, Rosario provided a revolver and the three departed in FIGUEROA's automobile [R. T. 86, 162].

The testimony concerning the trip to and escape from the Post Office indicated that all three of the individuals had been drinking heavily and that they were sketchy on the precise facts of who was located in what position in the automobile [R. T. 85, 87, 99, 101-04, 137, 146, 91, 109, 151]. However, all of the witnesses agreed that early in the afternoon, Ocasio left FIGUEROA's automobile and went to the post office [R. T. 56, 61, 62, 69-70, 88-89, 137-38]. Upon arrival at the post office, Ocasio demanded all of the money from Mrs. Jeri Thomas, the clerk who was on duty at the substation. She gave Ocasio approximately $150.00 from the postal money drawer and $300.00 from another drawer utilized for the collection of utility bills [R. T. 57, 59]. Immediately, after procuring the money, Ocasio departed and walked a short distance from the post office where he was picked up by FIGUEROA and Rosario. Mr. Garbett, the proprietor of the postal substation, observed Ocasio entering FIGUEROA's automobile. Mr. Garbet followed the automobile for a distance of several blocks until it made an escape on the freeway. The evidence established that the automobile used to effectuate the

the escape following the robbery was registered in the name of FIGUEROA [R. T. 71-75]. FIGUEROA and his two partners in crime then proceeded to Rosario's living quarters where they divided the money taken in the robbery [R. T. 92, 139-40].

Testifying at trial, FIGUEROA denied any involvement in the robbery. However, FIGUEROA admitted that the automobile used in the robbery was his, claiming that Ocasio and Rosario had taken the car while FIGUEROA was sleeping [R. T. 178, 169]. Moreover, FIGUEROA admitted that following the robbery he had known that the police were looking for him and that he was evading arrest during the period from March 29th to April 3, 1967, the date on which he surrendered to the law enforcement authorities [R. T. 183-84]. The Government presented one rebuttal witness who testified that -- in the presence of FIGUEROA -- Ocasio claimed that they had robbed the post office on East Carson Street and at this time FIGUEROA did not deny his involvement [R. T. 194].

At the close of the trial, Judge Carr carefully instructed the jury on the credibility of accomplices and admonished them not to consider the matter of punishment in their deliberations [R. T. 271, 276]. Judge Carr -- as well as counsel in their arguments -- emphasized that in order to return a verdict of guilty, the testimony of the accomplices must be believed beyond a reasonable doubt [R. T. 211, 248, 226-27]. On June 14, 1967, the jury returned a verdict finding FIGUEROA guilty of the lesser included offense, abetting the robbery of a United States Post

Office without the use of a dangerous weapon [C. T. 14; R. T. 291].

On June 26, 1967, Judge Carr sentenced FIGUEROA, Ocasio and Rosario each to imprisonment for a period of 10 years. Only FIGUEROA filed an appeal from this judgment.

III

ARGUMENT

A. THERE EXISTS SUBSTANTIAL EVIDENCE SUPPORTING THE CONVICTION OF DEFENDANT FIGUEROA.

1. THE RULE PERMITTING A CONVICTION TO BE BASED UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE IS WELL ESTABLISHED AND SHOULD NOT BE CHANGED.

FIGUEROA contends that the Ninth Circuit should abandon the long standing rule that a person may be convicted on the uncorroborated testimony of an accomplice [Brief for Appellant at 11-12]. In responding to a similar contention, the Ninth Circuit in Audett v. United States, 265 F. 2d 837, 846-47 (9 Cir. 1959), states:

> "The short answer is that the federal doctrine which permits such conviction is sound and consonant with the rule obtaining in the law of evidence that the testimony of one witness, if believed, is sufficient to prove a fact, is approved by the Supreme Court

and is firmly established in the law of this and other circuits."

The ruling set forth in Audett, supra, was reaffirmed in White v. United States, 315 F.2d 113, 115 (9 Cir. 1963), and Williams v. United States, 308 F.2d 664, 666 (9 Cir. 1962). The reason for this rule appears to be that it is for the trier of fact to ascertain the weight and credibility to be given to the testimony of an accomplice, and if it is believed beyond a reasonable doubt then it is sufficient to convict.

In the present case the testimony of Rosario clearly implicated FIGUEROA's involvement in the robbery of March 29, 1967. Rosario testified that FIGUEROA was the instigator of the criminal plan [R. T. 86]; that he drove the getaway car [R. T. 86-]; and that he received a portion of the funds obtained in the robbery [R. T. 92-93]. Ocasio testified to essentially the same facts, except for some minor variations [R. T. 137, 140, 152].

Although a cautionary instruction concerning the testimony of an accomplice is not an "absolute necessity" (see Audett v. United States, supra, at 847), the trial court warned the jury that the testimony of an accomplice "should always be received with great caution and weighed with great care" [R. T. 271]. Considering the long standing rule permitting a conviction to be based upon the uncorroborated testimony of an accomplice and the fact that the cautionary instruction was given, it is respectfully submitted that FIGUEROA's conviction be affirmed.

2. THE TESTIMONY OF THE ACCOMPLICES, OCASIO AND ROSARIO WAS CORROBORATED.

Appellant seeks to have this Court adopt a rule requiring corroboration of the testimony of an accomplice in order to sustain a conviction. It is recognized that in a number of jurisdictions this requirement does exist. See People v. McEwing, 46 Cal. 2d 218, 288 P. 2d 257 (1955) where the California Supreme Court stated:

> "The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth." (Id. at 224, 288 P. 2d at 260).

In the present case Mr. Garbett testified that he observed the robber Ocasio make his escape in a red Pontiac, license number LBS 475, and this automobile was proven to be registered in the name of FIGUEROA [R. T. 72-75]. Another point of corroboration is found in the testimony of Mr. Garcia who testified that on March 29th, in the presence of Ocasio and FIGUEROA, Ocasio admitted that they had robbed a post office. FIGUEROA did not deny his involvement at that time and it is, therefore, submitted that his silence was indicative of his involvement [R. T. 192-95].

In several areas FIGUEROA's own testimony corroborated

the testimony of Rosario and Ocasio. FIGUEROA admitted exchanging a number of small bills into a $100 bill at a liquor store [R. T. 176-77]. Mrs. Thomas, the victim of the robbery, testified that most of the money stolen consisted of small denomination currency [R. T. 58-59]. Furthermore, FIGUEROA admitted going into hiding for several days when he knew the police were looking for him [R. T. 183-84]. It is respectfully submitted that the above-mentioned corroborating evidence would constitute sufficient corroboration to satisfy those jurisdictions which require that the testimony of an accomplice be corroborated. See People v. Goldstein, 146 Cal. App. 2d 268, 303 P. 2d 892 (1956).

3. CONTRARY TO APPELLANT'S CONTENTION, THE TESTIMONY OF OCASIO WAS NOT INHERENTLY IMPROBABLE BUT RATHER CORROBORATED THE PRINCIPAL FACTS OF ROSARIO'S TESTIMONY IMPLICATING FIGUEROA IN THE ROBBERY.

It is well established that the jury is the sole judge of the credibility of the witness and the weight to be given to their testimony. See United States v. Schneiderman, 106 F. Supp. 906, 928-29 (S. D. Cal. 1952). However, because certain inconsistencies appear between the testimony of Rosario and Ocasio, appellant contends that the testimony of Ocasio should not have been considered by the jury [Brief for Appellant, at 10]. It is difficult to respond to a contention of this type, because there is no

allegation that any of the testimony given by Ocasio was incompetent for any reason. Moreover, any inconsistency in the testimony of Ocasio and Rosario would appear to inure to the benefit of FIGUEROA by discrediting Rosario's testimony.

A brief review of the testimony of Ocasio shows that it varies from the testimony of Rosario only as to insignificant details. The fact that their testimony revealed that all the individuals had been drinking heavily prior to the commission of the robbery could well explain any difficulty encountered in attempting to recall precisely the details concerning the robbery [R. T. 85, 87, 99, 101-04, 137, 146]. Ocasio and Rosario differed as to who was lying in the backseat of FIGUEROA's automobile during the escape [R. T. 91, 152]. It is this type of discrepancy that FIGUEROA contends establishes the fact that Ocasio's testimony cannot be believed. In addition, the record reveals that Ocasio required the assistance of an interpreter, and this undoubtedly created some problem in communication as to the manner in which questions are phrased and answered [R. T. 133-34]. However, Ocasio's testimony basically corroborated Rosario's statement of the facts occurring on March 29, 1967. Ocasio recalled meeting FIGUEROA, discussing the robbery, being driven to the post office by FIGUEROA, robbing the post office, Ocasio's returning to FIGUEROA's automobile, and FIGUEROA's receiving some of the proceeds [R. T. 137-40].

It is respectfully submitted that FIGUEROA's contention concerning the testimony of Ocasio is totally without merit. It is

within the province of the jury to evaluate the credibility of witnesses and make the finding of fact. United States v. Schneiderman, supra, at 928-29. In the instant case the jury had a full opportunity to evaluate the facts concerning the credibility of Rosario and Ocasio, who they believed beyond a reasonable doubt in order to convict FIGUEROA for his involvement in the robbery.

4. CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THE RECORD CLEARLY REFLECTS SUBSTANTIAL EVIDENCE TO SUPPORT THE CONVICTION OF FIGUEROA.

Appellant contends that there does not exist sufficient evidence to justify the conviction of FIGUEROA. In reviewing a contention of this type the role of the Appellate Court has been described by the United States Supreme Court by stating . . . "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942); accord, Audett v. United States, supra, at 844-45; and Peek v. United States, 321 F.2d 834, 945 (9 Cir. 1963), cert. denied 376 U.S. 954 (1964). In the present case there was uncontradicted testimony from both Rosario and Ocasio, both accomplices in the commission of this robbery, that FIGUEROA planned and executed the robbery with them [R.T. 86-87, 92-93,

137-40]. In addition, there was testimony that FIGUEROA drove his car during the robbery. Mr. Garbett, observed the red Pontiac -- belonging to FIGUEROA -- pick up Ocasio and escape from the scene of the robbery [R. T. 71-75]. Furthermore, FIGUEROA admitted going into hiding for approximately three days to avoid arrest, this flight being indicative of guilt [R. T. 183-84]. If the evidence is construed in the light most favorable to the Government, the record clearly supports the jury's determination that FIGUEROA committed the crimes with which he was charged. Therefore, it is respectfully submitted that there exists substantial and overwhelming evidence indicating FIGUEROA's guilt.

B. THE IMPOSITION OF THE MAXIMUM TERM PROVIDED BY LAW IS A MATTER OF JUDICIAL DISCRETION AND, WITHOUT A SHOWING OF ANY ABUSE OF THIS DISCRETION, SHOULD NOT BE DISTURBED ON APPEAL.

1. CONTRARY TO APPELLANT'S CONTENTION, THERE IS NO INDICATION FROM THE TRIAL RECORD THAT THE DISTRICT COURT DID NOT CONSIDER THE PROBATION REPORT IN SENTENCING FIGUEROA.

When the jury returned a verdict on June 14, 1967, Judge Carr stated that there was little chance that defendant FIGUEROA would be placed on probation [R. T. 294-295]. However, the defendant FIGUEROA was not sentenced at that time. Judge Carr referred the case to the Probation Department for the purposes of

receiving a pre-sentencing report [R. T. 298]. At the time of sentencing, the pre-sentencing report was discussed at length between Judge Carr and counsel for FIGUEROA [R. T. 315-17]. Judge Carr made it clear that he was determined to impose a jail sentence on the defendant FIGUEROA, as he did the codefendants Ocasio and Rosario [R. T. 322]. Judge Carr stated that his decision was controlled by the serious nature of the crime as well as the defendant's previous felony convictions in 1943 and 1952 [R. T. 318, 320-21]. Based upon the above-mentioned facts, it is respectfully submitted that the defendant's contention that the sentencing was made without the benefit of any pre-sentence report is frivolous, erroneous and without merit.

There exists a line of authority establishing that it is a matter of discretion for the trial court to have a pre-sentence report prepared. In United States v. Karavias, 170 F. 2d 968, 971 (7 Cir. 1948), the court rejected defendant's contention that Rule 32(c), Federal Rules of Criminal Procedure, imposed an obligation on the District Court judge to have a pre-sentence report prepared prior to sentencing. The court said:

> "[R]ule [32(c)] plainly indicates that the mandate is upon the probation officer and not upon the court. The court is not obliged to order a presentence report or to utilize the services of the probation department prior to passing sentence."

This same rule was applied by the Ninth Circuit in the case of Sherman v. United States, 261 F. Supp. 522, 532 (D. C. Hawaii (1966), aff'd 383 F. 2d 837 (9 Cir. 1967), where the court stated:

> "Although the normal procedure before sentencing is that the pre-sentence investigation is made and presented to the court, there is nothing in any of the statutes or rules which demands that such a pre-sentence investigation or report be made, filed with the court or considered by the court before sentencing."

Based upon the guiding principle that a trial court is not required to consider a pre-sentence report, or even to have one prepared, the defendant FIGUEROA's contention that the conviction should be reversed because the sentence was entered without the benefit of a pre-sentence report does not constitute reversible error. In fact, the manner in which the sentencing was conducted by Judge Carr was an exemplary procedure, giving full consideration to all pertinent facts and giving FIGUEROA full opportunity to present all facts on his own behalf.

2. THE IMPOSITION OF THE MAXIMUM TERM PROVIDED BY STATUTE UPON APPELLANT DID NOT VIOLATE THE EIGHTH AMENDMENT BAN AGAINST "EXCESSIVE, CRUEL AND UNUSUAL PUNISHMENT".

"If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits by a statute." See Gurara v. United States, 40 F. 2d 338, 340-41 (8 Cir. 1930).

The Ninth Circuit has repeatedly refused to question or to interfere with the trial judge's discretion in imposing a sentence when it is within the statutory limit. See Bryson v. United States, 265 F. 2d 914 (9 Cir. 1959); Brown v. United States, 222 F. 2d 293, 298 (9 Cir. 1955); Russell v. United States, 288 F. 2d 520, 524 (9 Cir. 1961).

The sentence imposed upon defendant FIGUEROA was ten years in the custody of the Attorney General. The jury's verdict finding a violation of Title 18, United States Code, Section 2114, without placing the life of any person in jeopardy or the use of a dangerous weapon, carries with it a maximum term of ten years incarceration. Considering that the defendant FIGUEROA had two prior felony convictions the sentence was not at all unreasonable. It may be noted that both the defendants Rosario and Ocasio, neither having as serious a criminal record as FIGUEROA,

received identical sentences [R. T. 323; C. T. 16]. It is respectfully submitted that appellant's contention is totally without merit.

C. THE DISTRICT COURT DID NOT ERR, NOR WAS THE DEFENDANT PREJUDICED BY THE COURT'S STATEMENT TO THE JURY THAT THE OFFENSE CHARGED IN THE INDICTMENT CARRIED WITH IT A PENALTY OF TWENTY-FIVE YEARS INCARCERATION, ESPECIALLY WHEN ALL COUNSEL CONSENTED TO THE MATTER BEING BROUGHT TO THE ATTENTION OF THE PROSPECTIVE JURORS.

Prior to impaneling the jury, Judge Carr inquired of both counsel as to whether they had any objection to his discussing with the jury the fact that a conviction of the charge contained in the indictment could result in a maximum incarceration of twenty-five years [R. T. 22-23]. Upon this request, counsel for defendant specifically stated that he had no objection to Judge Carr's discussing this matter with the jury [R. T. 22]. Despite this explicit waiver by counsel for FIGUEROA, appellant now contends that Judge Carr's comments to the jury constitutes prejudicial error [Brief for Appellant at page 8]. A review of Judge Carr's comments to the jury shows that the purpose and intent of the comment was to emphasize the gravity of the decision that the jurors would be called upon to make. Furthermore, Judge Carr informed the jury that the witnesses for the Government had entered pleas of guilty to the lesser included offense and, therefore, the maximum that they could be sentenced was ten years, whereas FIGUEROA

could be imprisoned for twenty-five years, if convicted [R. T. 23].

It is difficult to imagine how the discussion of the fact that FIGUEROA was facing a more severe punishment could have prejudiced his rights to a fair trial. The logical conclusion is that the jury was apprised of a possible inequity in finding FIGUEROA guilty, because of his aiding and abetting status when Ocasio, the man who actually went into the post office with a weapon, could only be imprisoned for ten years. If anyone was prejudiced by this, it would have been the Government. However, because of the nature of the case, and the desire for a careful consideration of the evidence, all parties concurred with the judge's desire to point out the gravity of the matter upon which the jurors must pass judgment [R. T. 22].

At the conclusion of the case, Judge Carr carefully instructed the jury that their sole duty was to determine the defendant's guilt or innocence of the crime with which he was charged. The court emphasized that the matter of punishment was for the court alone to decide and should not be considered by the jury in passing upon the guilt or innocence of FIGUEROA [R. T. 276]. Thus the jury retired to the deliberating room with Judge Carr's admonition and found FIGUEROA guilty of the lesser included offense -- the same offense to which Rosario and Ocasio had pled guilty. Appellant has failed to indicate in what manner FIGUEROA was prejudiced by Judge Carr's comments concerning the sentence involved under the statute. As the reviewing courts have frequently stated: "We do not presume error; we require the appellant to

demonstrate it." Sica v. United States, 325 F.2d 831, 836 (9 Cir. 1963), cert. denied 376 U.S. 952 (1964). In the present case appellant has failed to establish in any manner how or why he was prejudiced by Judge Carr's statements to the jury concerning the ostensibly inequitable position of FIGUEROA when compared to Ocasio and Rosario.

IV

CONCLUSION

For the reasons set forth in this brief, appellee respectfully submits that the conviction be affirmed.

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